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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THOMAS GONSA,
Petitioner,

v.

EDWARD R. DONNELLY, Superintendent,
Wende Correctional Facility,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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Question Presented for Review

Did the sentence imposed by the state court violate petitioner's constitutional right under the Fifth Amendment of the Constitution of the United States, as applied to the states through the Fourteenth Amendment, prohibiting double jeopardy of persons by sentencing the petitioner twice for the same crime.

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STATEMENT OF BASIS FOR JURISDICTION

Petitioner Thomas Gonsa, hereinafter referred to as Petitioner, respectfully petitions for a writ of certiorari pursuant to Supreme Court Rule 10 from denial of a petition for habeas corpus from the United States Court of Appeals for the Second Circuit. Denial of the petition for habeas corpus was filed with the Clerk's Office on February 11, 2003. Petition for rehearing emanates from a Summary Order of the above Court filed November 25, 2002, oral argument for which was heard before the Hon. Ralph K. Winter; Hon. Robert D. Sack and Hon. Sonia Sotomayor, Circuit Judges, on August 6, 2002 . This Summary Order affirmed the Judgment of the U.S. District Court for the Northern District of New York, dated February 15, 2000, denying Appellant's application for a Writ of Habeas Corpus on the ground the sentence imposed by the state court violated the double jeopardy clause of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment.

Randi Juda Bianco, Esq., attorney for Petitioner, expresses a belief, based upon reasoned and studied professional judgment, that granting a petition for writ of certiorari is necessary to secure or maintain uniformity in the court's decisions. Specifically, the lower court's decision conflicts with the United States Supreme Court's holding in Missouri v. Hunter, 459 U.S. 359 (1983). In Missouri v. Hunter, the Supreme Court held that even though two criminal statutes apparently proscribed the same conduct, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. In the case at bar, the legislative intent was not considered when the sentencing court was permitted to enhance Petitioner's sentence by punishing him twice for the same offense. Petitioner submits that consideration by this Court is therefore necessary to secure and maintain uniformity of the court's decisions.

Pursuant to Supreme Court Rule 12(c), your deponent contends both the state courts and the United States Court of Appeals for the Second Circuit have decided upon an important federal question that conflicts with relevant decisions of this Court.

This petition is based on the following points: Petitioner respectfully submits that the Court's Summary Order should be reversed in part and affirmed in part. The Petitioner agrees with that portion of the Summary Order which found that it was improper for the State Court to run the Petitioner's Robbery sentence consecutive to the Felony-Murder sentence where the Robbery was the underlying felony for the Felony-Murder. Petitioner agrees that the Robbery sentence should run concurrent to the Felony Murder Sentence [Summary Order p. 1 at lines 17-22]. However, Petitioner disagrees with that portion of the Summary Order which holds that the ***same Robbery sentence***, which runs concurrently to the Felony Murder sentence, will also run consecutively to the Depraved Indifference Murder sentence [Summary Order p.1 at lines 21-23]. Petitioner submits that since Petitioner was convicted of only ***one*** count of Robbery, he is being punished twice for the same act of Robbery in violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution as made applicable to the states though the Fourteenth Amendment.

Petitioner respectfully submits that the Summary Order is flawed in four respects: 1) the Petitioner is now serving two sentences for a ***single Robbery*** conviction; 2) it is improper for the Robbery sentence to run consecutively to the Depraved Indifference Murder sentence because Petitioner is already being punished for the ***same*** robbery conviction in his sentence of Felony-Murder; 3) the Petitioner respectfully submits that the Court's reliance on Missouri v. Hunter, 459 U.S. 359 (1983) is flawed and/or misplaced; and 4) the sentencing error is not harmless.

PROCEDURAL BACKGROUND

In the case at bar, Petitioner was convicted after trial of two counts of Murder in the Second Degree (NYS Penal Law §§ 125.25(2) & (3), Depraved Indifference and Felony-Murder); **one count of Robbery** in the First Degree (NYS Penal Law §160.15); and one count of Criminal Possession of Stolen Property in the Fifth Degree (NYS Penal Law § 165.50). He was found not guilty of Intentional Murder (NYS Penal Law §125.25(1)). The convictions arose out of his alleged participation with two others in the robbery of a 1990 Chevrolet Beretta belonging to a Robert Grasso who died during the course of the commission of this robbery. All crimes alleged took place at or about the same time [Trial Testimony 1567-1598 (hereinafter referred to as TT)]. The trial court correctly charged the jury that the petitioner had to be found guilty of robbery in order to convict him on Felony-Murder.

After the conviction, Petitioner was sentenced to 25 years to life on each of the murder counts to run concurrently with each other [TT. 1726]. The trial court then imposed a term of imprisonment of 8 1/3 years to 25 years for the robbery offense which was to run **consecutive** to the murder counts [TT. 1727, see also Certificate of Conviction[1] at A-19]. A term of imprisonment of 2 1/3 years to 7 years was imposed for the Criminal Possession of Stolen Property conviction to run concurrently with the Robbery conviction.

In his appeal to the New York State Supreme Court, Appellate Division, Third Department, Petitioner argued the

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[1] Relevant portion of certificate of conviction states: "upon conviction of each count of Murder, Second Degree, Defendant is sentenced to an indeterminate term of imprisonment which shall have a maximum of LIFE and a minimum of twenty-five (25) years, to be served concurrently. Upon conviction of Robbery, First Degree, Defendant is sentenced to an indeterminate term of imprisonment which shall have a maximum of eight and one-third (8 1/3) years to be served consecutively to **sentences** imposed under Murder, Second Degree" (emphasis added).

sentencing court erred in imposing consecutive sentences for Petitioner's conviction of Robbery in the First Degree and two counts of Murder in the Second Degree where: 1) all counts arose out of a single incident; and 2) the Robbery offense in itself constituted one of the offenses and was also a material element of the felony-murder offense. The New York State Supreme Court, Appellate Division, Third Department, affirmed the judgment of conviction, People v. Gonsa, 220 A.D.2d 27 (3rd Dept. 1996). Leave to Appeal was denied by the New York Court of Appeals, People v. Gonsa, 89 N.Y.2d 923 (1996). Petitioner raised this issue again in a Habeas Corpus petition with the United States District Court for the Northern District of New York. Magistrate Gustave J. DiBianco denied the petition in a "REPORT-RECOMMENDATION" dated August 13, 1999. Pursuant to 28 U.S.C. Section 636 [b][1] and local rule 72.1 [c] Petitioner filed his objections to the REPORT-RECOMMENDATION with the District Court. On February 17, 2000, Judge Frederick J. Scullin Jr., modified Magistrate DiBianco's REPORT-RECOMMENDATION and accepted it as modified and further denied and dismissed the Petitioner's Habeas Corpus petition brought pursuant to 28 U.S.C. § 2254. Thereafter, Petitioner filed a request for a Certificate of Appealability on May 15, 2000. On November 21, 2000, Petitioner's motion for a Certificate of Appealability was granted only on the issue of whether the County Court violated Gonsa's rights under the Double Jeopardy clause of the Fifth Amendment, as applicable to the states through the Fourteenth Amendment, by imposing Gonsa's robbery sentence to run consecutive to the felony-murder sentence, where the robbery constituted the felony element of the felony-murder. On November 25, 2002, the U.S. Court of Appeals affirmed in a Summary Order the Judgment of the District Court, dated February 15, 2000.

ARGUMENT

1) Petitioner Is Now Serving Two Sentences For A Single Robbery Conviction.

According to the Summary Order, the Petitioner is now serving two sentences for a **single** Robbery conviction as said sentence runs concurrently with the sentence for Felony-Murder and consecutively to Depraved Indifference Murder [See Summary Order p. 1 lines 17-23]. Since there is only **one** Robbery Conviction, Petitioner is being punished **twice** for the single Robbery conviction which is in violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution as made applicable to the states though the Fourteenth Amendment. See also Ball v. United States, 470 U.S. 856 (1985).

2) It Is Improper For The Robbery Sentence To Run Consecutively To The Depraved Indifference Murder Sentence.

Petitioner submits that it was error for the Court to impose a consecutive Robbery sentence to his Depraved Indifference Murder sentence as: 1) Robbery in the First Degree and Felony-Murder were part of the **same act** and the Robbery was a material element of the conviction of Felony-Murder. The imposition of a consecutive Robbery sentence to the Depraved Indifference Murder Sentence would punish the Petitioner **twice** for the **same** Robbery as the Petitioner was already being punished for Robbery by his conviction for Felony-Murder. Had it not been for the Felony-Murder conviction, the court could have sentenced Petitioner to consecutive sentences for Depraved Indifference Murder (Penal Law § 125.25(2)) and Robbery without such sentence being violative of the Double Jeopardy Clause as the defendant's conduct for Robbery would not have been taken into account by another

sentence. As it presently stands, Petitioner is being punished twice for the same conviction for Robbery.

3) Petitioner Respectfully Submits That The Lower Court's Reliance On Missouri v. Hunter, 459 U.S. 359 (1983) Is Misplaced.

In Missouri v. Hunter, 459 U.S. 359 (1983), the defendant was convicted in a single trial on both the charge of Armed Criminal Action and First Degree Robbery. The Robbery charge was the underlying felony of the Armed Criminal Action charge. In Missouri v. Hunter, the defendant had contended that the sentences for both First Degree Robbery and Armed Criminal Action violated the double jeopardy clause of the Fifth Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment. The United States Supreme Court disagreed because the Missouri legislature specifically authorized cumulative punishments for these offenses in drafting the statutes.[2] Thus even though the two criminal statutes apparently proscribed the same conduct, the Supreme Court held that the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. It is clear that the Missouri legislature intended cumulative punishments. However, Petitioner contends that the New York legislature did not intend to authorize cumulative punishments in cases like the case at bar. (See P.L. 70.25(2).)

In the case at bar, the New York legislative intent was to run sentences such as these concurrently. Specifically, New York Penal Law Section 70.25(2) states

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[2] In Missouri v. Hunter, the Missouri statute prescribing armed criminal action provided that any person who committed a felony through the use of a dangerous or deadly weapon was also guilty of the crime of armed criminal action punishable by not less than three years imprisonment. This punishment "shall be in addition" to any punishment provided by the law for the felony (Id at 362). Thus, the Missouri's legislative intent was explicit and clearly expressed that there would be an additional punishment for the same conduct.

"when more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentence...must run concurrently". (Emphasis Added). Thus, unlike Missouri v. Hunter, the New York State Legislature has unquestionably set forth their intent that in a case such as this, the sentences are to run concurrently, not consecutively. In Petitioner's case, both prongs of Penal Law 70.25(2) mandate concurrent sentences. Specifically, two or more offenses (i.e., Robbery and Felony-Murder) have been committed through a **single** act (i.e., the act of Robbery). Additionally, Robbery constituted one of the offenses and was a material element of the other (i.e., the underlying felony for the charge of Felony-Murder). To put matters simply, without the Robbery there could be no conviction for Felony-Murder. The elements of Robbery are subsumed by the charge of Felony-Murder. Therefore, by Petitioner's sentence for Felony-Murder, he is being punished for the crime of Robbery.

Contrary to the holding in Missouri v. Hunter, when the court imposed Petitioner with a consecutive Robbery sentence for the same Robbery as that underlying the Felony-Murder, it imposed a greater sentence than that authorized by the legislature.

4) The Sentencing Error Is Not Harmless

The consecutive Robbery sentence imposes an additional 8 1/3 to 25 years imprisonment which runs **consecutive** to the Depraved Indifference Murder Count. Although the Criminal Possession of Stolen Property count also runs consecutively to the Murder counts, the Petitioner's sentence on this count was only 2 1/3 years to 7 years. Thus the Robbery sentence still imposes the additional punishment of 6 - 18 years notwithstanding the

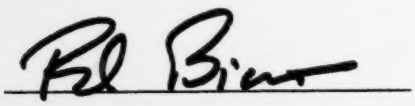
Criminal Possession of Stolen Property count. Simply, Petitioner is being punished for one conviction of Robbery which runs concurrently with the Felony- Murder sentence **and** one conviction of Robbery to run **consecutively** to the Depraved Indifference Murder sentence. This double and separate punishment for one conviction of Robbery adds an additional 6-18 years to Petitioner's total sentence.

CONCLUSION

Petitioner submits that he is entitled to relief under 28 USCA 2254 (3)(d)(1), because the claim that was adjudicated on the merits in state court resulted in a decision that was contrary to clearly established federal law. Petitioner further submits that pursuant to 28 USCA 2254 (3)(d)(2), the state court's adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Specifically, by serving a sentence for the **one** count of Robbery concurrent to Felony Murder and consecutive with Depraved Indifference Murder, Petitioner is being punished **twice** for the same conduct of Robbery, which is in violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution.

Dated: May 12, 2003
Syracuse, New York

Respectfully Submitted:



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APPENDIX

State of New York : County of Broome
County Court

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS GONSA

CERTIFICATE OF CONVICTION

Indictment No. 91-564-1

This is to certify that a judgment of Conviction has been entered in this Court, before the Hon. Martin E. Smith, a Judge of this Court, on the 18th day of November, 1992, convicting the above named Defendant of the offense of:

Murder in the Second Degree, in violation of Section 125.25(2), of the Penal Law, a Class AI Felony; Murder in the Second Degree, in violation of Section 125.25(3), of the Penal Law, a Class AI Felony; Robbery in the First Degree, in violation of Section 160.15(1), of the Penal Law, a Class B Felony; and Criminal Possession of Stolen Property in the Third Degree, in violation of Section 165.50, of the Penal Law, a Class D Felony,

and sentence was imposed on December 18, 1992 as follows:

Upon conviction of each count of Murder, Second Degree, Defendant is sentenced to an indeterminate term of imprisonment which shall have a maximum of LIFE and a minimum of twenty-five (25) years, to be served concurrently. Upon conviction of Robbery, First Degree, Defendant is sentenced to an indeterminate term of imprisonment which shall have a maximum of twenty-five (25) years and a minimum of eight and one-third (8 1/3) years, to be served consecutively to sentences imposed under Murder, Second Degree. Upon conviction of Criminal Possession of Stolen Property, Third Degree, Defendant is

sentenced to an indeterminate term of imprisonment which shall have a maximum of seven (7) years and a minimum of two and one-third (2 1/3) years, to be served concurrently with sentenced imposed under Robbery, First Degree. Defendant is committed to the custody of the State Department of Correctional Services and shall be delivered to the Elmira Correctional Facility at Elmira, New York. The Court imposes a surcharge of $155.

Dated at:
Binghamton, New York
24th day of March, 1993

S/ Ellis W. Bozzolo

ELLIS W. BOZZOLO
COURT CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS GONSA,

Petitioner,

v. 97-CV-1828
(J. Scullin)

JAMES STINSON, Superintendent,

Respondent.

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GUSTAVE J. DI BIANCO, Magistrate Judge

REPORT-RECOMMENDATION

This matter has been referred to the undersigned by United States District Judge Frederick J. Scullin, Jr., pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

Petitioner filed the instant habeas corpus petition on December 12, 1997. This court issued an Order pursuant to the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. fol. § 2254, granting petitioner leave to proceed *in forma pauperis*, ordering service of the

petition on respondent, and requiring service of an answer or other pleading by respondent. Respondent filed his answer, together with the pertinent state court records[1] and a memorandum of law. Petitioner filed a "reply" memorandum on June 18, 1998.

Petitioner complains of the judgment rendered against him on December 18, 1992, following a jury trial in Broome County Court, wherein he was convicted of two counts of murder in the second degree, on count of robbery in the first degree and criminal possession of stolen property in the third degree. Petitioner was sentenced to concurrent twenty-five year to life sentences for the murder convictions, eight and one-third to twenty-five years for the robbery convictions to run consecutively to the sentence imposed for the murder convictions, and two and one-third to seven years for criminal possession of stolen property, to run consecutively to the murder sentences and concurrent with the robbery sentence. Petitioner's aggregate sentence is thus an indeterminate term of 33 and 1/3 years to life imprisonment.

The Appellate Division, Third Department, affirmed the convictions on June 13, 1996.[2] *People v. Gonsa*, 220 A.D.2d 27, 644 N.Y.S.2d 346 (3rd Dep't 1996). The New York Court of Appeals denied leave to appeal on December 13, 1996.[3] *People v. Gonsa*, 89 N.Y.2d 923, 654 N.Y.S.2d 725 (1996).

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[1] The state court records submitted by respondent are listed on pages 2-3 of the answer. (Docket #8).

[2] On direct appeal, petitioner raised five issues: 1) trial court error for permitting the introduction of evidence regarding uncharged crimes, bad acts, immoral conduct and petitioner's flight; 2) prosecutorial misconduct; 3) ineffective assistance of counsel; 4) insufficient corroboration of accomplice testimony; and 5) error in imposing consecutive sentences for petitioner's convictions of robbery and murder, when all counts arose from a single incident.

[3] In his application seeking leave to appeal, petitioner asked the Court of Appeals to consider whether 1) a conflict exists between the Third and Fourth Department Appellate Divisions regarding reconstruction hearings when the record is silent as to a defendant's presence at *Ventimiglia* hearings; 2) the Third Department erred by creating a vague and

Petitioner raises five claims in the instant application for habeas corpus relief. Petitioner argues that (1) the sentences imposed by the state court violate the Double Jeopardy Clause of the Fifth Amendment; 2) the People changed their theory of prosecution as to the manner and cause of the victim's death without adequate notice, depriving him of the right to due process of law and a fair trial; 3) introduction of evidence of uncharged crimes and bad acts, without prior notice, deprived him of the right to due process of law, to confront and cross-examine witnesses, to a fair trial and to present a defense; 4) he was deprived of a fair trial as a result of prosecutorial misconduct and that the state court's decision was contrary to established federal law; 5) he was deprived of the right to equal protection and due process of law when the Third Department relied on the presumption of regularity, rather that provide a reconstruction hearing as is provided to similarly situated defendants in the Fourth Department.

Respondent seeks dismissal of the petition on the grounds that petitioner has procedurally defaulted on the claims raised in grounds one, two, three and five of the petition and that his prosecutorial misconduct claim fails on the merits.

For the following reasons, this court recommends that the petition be denied and dismissed.

1. Facts

Petitioner's conviction resulted from the murder of Robert Grasso, a mildly retarded man who had befriended petitioner; and co-defendants Michael Lussier and Dennis Meehan, while they were residents at Arbor House, an alcohol and drug treatment program where Grasso had

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indefinite category of uncharged crimes based on "types" which enjoy a relaxed standard of admissibility; 3) the Third Department erred by finding that petitioner could receive five sentences for four crimes; 4) the Third Department applied an improper standard of review regarding petitioner's prosecutorial misconduct claim; and also 5) requested the Court to address the remaining issues in his appellate brief.

volunteered and visited. Grasso drove a 1990 Chevrolet Beretta, and, in the week before the murder, had chauffeured Lussier and Meehan around town and to various drinking spots.

Before petitioner became involved, Lussier and Meehan discussed stealing Grasso's car and relocating to Florida.[4] (T. 156; 305-306; 315; 552-553; 558; 569). They considered tying Grasso to a tree, or abandoning him after sending him into a store to buy beer. (T. 156; 162). Lussier testified that Meehan told petitioner of the plan on Thursday, July 11,1991, while he, Lussier, Meehan and Grasso were drinking at Lake Ontario. (T. 165, 315-316). Although the three men initially agreed to execute the plan the following night (T. 167), petitioner later suggested they wait until Monday so that he could collect his paycheck and pick up food stamps from home. They also discussed the fact that they would need clothing for the journey to Florida (T. 174).

On Friday evening, Grasso again drove petitioner, Meehan and Lussier to Lake Ontario to drink. (T. 168; 173). Afterwards, they went to a bar in Syracuse. (T.174). On the trip back to Oswego, petitioner drove Grasso's car. (T. 176). Grasso started complaining about the open beer cans in his car, and petitioner suggested pulling over so they could finish drinking. (T. 175-176). Grasso wanted to go home, but petitioner pulled off the highway and into a parking lot. (T. 176-177). Lussier testified that he sensed that the plan was going to be carried out right then because the area was so secluded. (T. 186). Lussier testified that a bright street light provided light to the parking lot. (T. 188).

When they got out of the car, Meehan immediately started hitting Grasso in the face. (T. 177). Petitioner put his arm around Grasso's shoulder and walked him towards the passenger door. Petitioner reassured Grasso and told

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[4] Lussier and Meehan told several people about the Florida plan, including Bill Thompson and his wife, Brittany. Thompson did not want to participate. (T. 163; 549; 569; 558).

Meehan to stop hitting him. (T. 177). When Meehan suggested knocking Grasso out and taking the car, petitioner winked at Lussier and Meehan. Lussier interpreted the wink as a signal to carry out the plan (T.177), and grabbed a four foot long, three inch wide tree limb. Petitioner nodded his head and started talking loudly to Grasso. Lussier struck Grasso in the forehead, leaving a four inch laceration. (T.179). Again, petitioner tried to console Grasso and tell him it was an accident. (T. 180).

Grasso grabbed hold of the car window and tried to get back in the car. Lussier, Meehan and petitioner pulled Grasso away, and the car window shattered and. Lussier testified that Grasso fell down and he [Lussier], petitioner and Meehan started "kicking and stomping" on him; Lussier stomped on Grasso's ribs and stomach, and petitioner and Meehan stomped on his head and face. (T.180; 87-188).

Grasso was moaning. Although obviously in a lot of pain, Grasso attempted to get up. (T. 180-181). Lussier testified that he took a brick and "slammed it full force down on [Grasso's] head which caused the brick to bounce off." Lussier repeated that act five to six times. (T.181). Lussier did not recall whether it was Meehan or petitioner who asked for a chance to try the brick, but did recall that petitioner picked up the brick and hit Grasso two times in the head. Lussier testified that petitioner then tossed the brick away and said "let's finish him off. He's already had enough." (T.181-182).

According to Lussier, petitioner opened the truck and pulled out a long metal object. Lussier saw petitioner walk over to Grasso, and while standing over him, stab the metal object up and down in Grasso's mouth two times. (T.182). Lussier testified that Grasso looked dead.[5] There

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[5] Dr. Terzian testified that the Grasso died as a result of multiple fractures of the skull and facial bones, consistent with blunt trauma. (T.1207). According to Dr. Terzian, a number of the victim's injuries could have been fatal by themselves, e.g. he suffered a fracture at the base of the skull and the side of the head, as well as nasal and cheek fractures. Dr. Terzian

was a lot of blood, his face was bruised, and one side looked caved-in. He was missing his front teeth. (T.183). Lussier and petitioner wrapped Grasso's shirt around his head and dragged him to the trunk. (T.183).

In the car, Meehan suggested they clean up the blood. Petitioner drove to a body of water about ten minutes away, where they tried to clean up. Petitioner buried the metal object in the mud. When they got back in the car, they were muddy and still bloody. (T.184-185). They headed to Binghamton. (T.185). Meehan suggested burying the body, which everyone agreed was a good idea. (T.188).

They arrived at Jeff McGargle's apartment in Endicott at 2:30 a.m. (T.189). Out front, they met Adam Shepardson, Dave Thomas and Steve Russell. (T.189). Lussier testified that he and Meehan called petitioner Bob, because it was Bobby Grasso's car. (T.189). Thomas invited them to his apartment, and agreed to let the three men spend the night.[6] Petitioner went immediately to bed. (T.189-190).

While petitioner slept, Lussier, Meehan, and Thomas took the car to get more beer (T.190). Lussier testified that he confessed to Adam Shepardson that they had just killed a man in Syracuse, and that the body was in the trunk. (T.191). At 5:00 a.m., Lussier and Meehan "borrowed" a shovel from Thomas' neighbor's house, and left to bury Grasso's body. (T.192). After burying the body, they drove to a friend of Meehan's, who gave them clean clothes. (T.196). When they returned to Thomas' apartment, they told petitioner they had buried the body. Petitioner thanked them, and suggested they shower. They left their dirty clothes in the apartment, and petitioner scrubbed their sneakers in the kitchen sink. (T.197).

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testified that the injuries were consistent with blows from having been stomped on the head by feet; hit in the head with a brick, and having had a metal-like object rammed down his throat. (T.1222).

[6] Several people present in the apartment testified that the three were muddy when they arrived. (*See* T.628-629; 631; 651; 694; 702; 737).

More vodka was purchased. Lussier testified that he drank until he fell asleep. (T.199). Peter Vicente and his wife arrived at Thomas' apartment while Lussier was sleeping. (T.762). At trial, Vicente testified that petitioner was introduced as "Tom" (T.764). Petitioner told Vicente that he wanted to sell his Beretta, and that his father was a car dealer in Oswego. (T.764; 804-805). Vicente agreed to buy the Beretta for $500 and his 1978 blue Chevrolet van. (T.767; 912). When petitioner signed his name as "Bobby Grasso" on the registration and contract, he explained to Vicente that "Tom" was his nickname. (T.768-769; 771).

Lussier testified that he woke up in Peter Vicente's van on Buffalo Road, near a popular spot in Endicott. (T.199-200). Petitioner told Lussier that he sold Grasso's car to Vicente, in exchange for $300 and the van. (T.200). Later, petitioner lost the keys to the van and it had to be pushed from the party. When Officer Vanek stopped the vehicle, he recognized the men pushing the van as Meehan and Shepardson. Vanek testified that petitioner was steering, and Lussier was passed out in the back. (T.847; 852). Petitioner told Vanek he had run out of gas. At first, he claimed not to have his wallet, but when Vanek spotted it on the floor; petitioner admitted it was his. (T.849). Vanek also recovered another wallet that contained Grasso's driver's license and personal papers. Petitioner explained that Grasso was a friend who was still at the party. (T.854). Lussier woke up the next morning on Michelle Petry's couch. (T.201). That morning, they ran into Vicente, who asked petitioner for his money back. Lussier testified that petitioner looked concerned. (T.202-203).

Vicente testified that he had been hosing down the muddy Beretta, when he noticed a red liquid oozing out of the trunk. (T.779-780). Vicente described a foul odor when he opened the trunk, and testified that he saw dried blood and hair. (T.780; 822). Vicente immediately drove to Thomas' house and told petitioner he wanted his money back. Petitioner told Vicente not to worry because it was

only deer blood, and offered to clean the trunk. Petitioner was calm and convinced Vicente to keep the car. (T.781). When petitioner cleaned the trunk, Vicente saw "non-stop redness coming out."(T.783).

While checking the van to see that he did not leave anything, Vicente found papers and an ID belong to Robert Grasso and learned that petitioner was not Grasso. (T.788). When petitioner left, ostensibly to retrieve the title, Vicente called the police. (T.790-791).

In the van, the three co-defendants realized that they had told too many people about the Florida plan and decided to go to California. (T.204). When the van broke down in Ohio, the co-defendants met an elderly couple, Sarah and Allistair Wright. (T.205). Petitioner, who did most of the talking, told the Wrights he was a college student. (T.968-969). They said they had been robbed, and needed to get back to Syracuse. (T.206; 966; 968). The Wrights took them in, fed them and provided them with a place to sleep that night. (T.207). When they learned that the van could not be repaired, the Wrights gave petitioner money to buy three bus tickets to Syracuse. (T.208-209). In Cleveland, they switched buses to Cincinnati, and took a cab to Missouri. (T.210).

The three co-defendants met a Mayflower truck driver named Mike Barkley[7] and his partner Ed, who hired them to help load and unload his truck. (T.211-213). They told Barkley they were headed to California. (T.213). Lussier testified that Meehan and petitioner had not been getting along, and that petitioner and Meehan argued after petitioner lost their money gambling in Las Vegas. (T.217-218; 222; 224). When Lussier and Meehan refused to work, Barkley fired them. (T.217-218). The trio split up, though according to Lussier, they had arranged to meet up again in

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[7] Barkley testified that petitioner told him that his name was Tom Baxter, and that he had gotten in trouble in college and took off because he was afraid to tell his parents. (T.1037-1038). Barkley testified that petitioner seemed to be the leader of the three. (T.1044).

Long Beach, California.[8] (T.219-220; 224). They discussed their alibi several times before splitting up, and agreed to blame the murder on a fictional fourth individual named Rodney. (T.221).

Petitioner's next ride was with trucker Thomas Burrows. (T.1060). Petitioner told Burrows he was Tom Sandelsky from Chicago, and that his parents were millionaires. (T.1062-1063; 1066-1067). Petitioner also told Burrows that he and his friends had planned on stealing a car and moving to Florida. (T.1064; 1078). Burrows took petitioner to his home in Georgia in September of 1991. According to Burrows, petitioner was a "perfect gentleman" until he drank, at which point he would become "obnoxious, belligerent and hateful." (T.1065; 1069). At one point, Burrows offered to teach petitioner how to drive a tractor trailer, but petitioner backed out after learning that the run was to New York State. (T.1078). In January, petitioner left Burrows' home. (T.1072). Subsequently, Burrows' wife found petitioner's driver's license, and when she discovered that petitioner was not Tom Sandelsky, she reported it to the police. (T.1073).

Meanwhile, Lussier and Meehan found themselves without money, food or clothing, and turned themselves into authorities in Arizona. (T.245; 247). Initially, Lussier told the police the "Rodney story." (T.255). When confronted with his confession to Adam Shepardson, Lussier agreed to reveal the location of the body and testify against petitioner and Meehan, in exchange for a plea to manslaughter in the first degree and a maximum sentence of

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[8] After they separated, Lussier and Meehan met a man named Robert, who took them in. Meehan and Robert got into a physical altercation, which culminated in Meehan smashing a rock on Robert's head. (T.233). Lussier and Meehan were arrested and gave the police false names. (T.234-235). After they were released, they stayed with Michael Accardia, whom they met in jail (T.237-238). They beat and robbed him as well. Lussier hit him on the head with a bottle, Meehan stabbed him in the chest, and Lussier stabbed him in the shoulder. (T.242).

eight and a third to twenty-five years imprisonment. (T.278-280).

2. Exhaustion of State Court Remedies and Procedural Default

Prior to seeking relief in federal court, it is well settled that a petitioner must exhaust available state remedies or show that there is either an absence of available state remedies or that such remedies are ineffective to protect petitioner's rights. *Ellman v. Davis*, 42 F.3d 144, 147 (2d Cir. 1994), *cert. denied* 515 U.S. 1118 (1995). Additionally, the petitioner's claims must be fairly presented so that the state court has the opportunity to decide any federal constitutional issues. *Id.* Finally, the petitioner must have presented the substance of his federal claims to the highest court of the state, *Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994), *cert. denied*, 514 U.S. 1054 (1995)(citation omitted).

A state defendant may fairly present the constitutional nature of his claim to the state court without citing "chapter and verse" of the Constitution by (a) relying on pertinent federal cases employing constitutional analysis, (b) relying on state cases employing constitutional analysis in like fact situations, (c) asserting the claim in terms so particular that they call to mind a specific right protected by the constitution, or (d) alleging a pattern of facts that is well within the mainstream of constitutional litigation. *Daye v. Attorney General*, 696 F.2d 186, 192-194 (2d Cir. 1982)(en banc), *cert. denied*, 464 U.S. 1048 (1984). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982)(citations omitted).

Generally, if a federal habeas petition contains unexhausted claims, a federal court should dismiss it. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, when it is clear that the state court would consider the unexhausted claims

to be procedurally barred, the claims are deemed exhausted. *Grey v. Hoke*, 933 F.2d 117, 120-121 (2d Cir. 1991). Here, New York's procedural rules would plainly bar petitioner from raising the claims at issue in grounds one, two, three and five, as only one application for leave to appeal is permitted. N.Y. Court Rules § 500.10(a). Furthermore, a post-judgment motion is unavailable where an issue has been raised on direct appeal. N.Y. Crim. Proc. Law (C.P.L.) § 440.10(2)(a). *See also* C.P.L. § 440.10(2)(c)(a claim is unavailable for review in a motion to vacate the judgment when it is based upon facts ascertainable from the record and thus should have been raised on direct appeal.)

A. Double Jeopardy

In ground one, petitioner argues that the sentence imposed by the state court violates the Double Jeopardy Clause of the Fifth Amendment because he was sentenced to "two terms of imprisonment for the single crime of Robbery in the First Degree." *See* Petitioner's Memorandum, at p. 1. The basis for petitioner's "double punishment" claim is that the sentence imposed for the robbery conviction was imposed concurrently with that imposed for the felony-murder conviction and consecutively to that imposed for his conviction of depraved indifference murder.[9]

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[9] On direct appeal, petitioner argued that the trial court erroneously imposed *consecutive* sentences for the robbery and felony murder convictions. The Third Department, however, found that County Court imposed *concurrent* sentences for the murder convictions because they were based upon the same homicidal act; *concurrent* sentences for the robbery and felony murder convictions because the robbery constituted the felony element of the felony murder; and *consecutive* sentences for the robbery and depraved indifference murder because there was "evidence that the victims serious physical injury was caused by an act other than the homicidal act." *People v. Gonsa*, 220 A.D.2d at 32-33. In his leave application, petitioner argued that the Third Department was factually incorrect because the sentence imposed for the robbery conviction was consecutive to that imposed for the felony murder conviction. Although petitioner argues in the instant habeas corpus petition the state court decision affirming his sentence was based on an erroneous and unreasonable determination of the facts, the focus of

Respondent concedes that petitioner raised the same factual basis in his application seeking leave to appeal to the New York Court of Appeals as he does in this petition. However, respondent asserts that petitioner focused solely on the Appellate Division's interpretation of New York Penal Law § 70.25, and did not inform the state court of both the factual and legal premises of the claim now asserted in federal court. Thus, he claims petitioner did not fairly present his constitutional claim to the state's highest court.

This court disagrees and finds that petitioner fairly presented his double jeopardy claim to the state's highest court "by an assertion of double jeopardy in terms so particular as to call to mind a specific right by the Constitution." *Daye v. Attorney General*, 696 F.2d at 194. Petitioner argued that it was legal error for five sentences to be imposed for four crimes and that the Appellate Division impermissibly imposed "a double punishment for a single crime, as [he ...] was sentenced both concurrently and consecutively for the same robbery." Since the phrase "double punishment for a single crime" calls to mind the constitutional argument of double jeopardy, petitioner has exhausted state court remedies as to this issue.

However, this court finds no merit to petitioner's claim. Under New York law, the court was authorized to impose consecutive sentences for the convictions of depraved indifference murder and robbery in the first

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his double jeopardy claim is the imposition of both concurrent and consecutive sentences for the robbery conviction.

This court notes that the sentencing court imposed the sentence for the robbery conviction "consecutively to *the sentence* imposed under Counts 2 and 3." *See* T.1727. Although this suggests that the robbery conviction was imposed consecutive to both murder convictions, the language is unclear, as the court referred to one sentence. As this court was not provided with a certificate of conviction, this court presumes that the Appellate Division's factual finding is correct. *See e.g. Dickerson v. Fogg*, 692 F.2d 238, 242 (2d Cir. 1982)(A federal court is required to give a state court finding of fact a presumption of correctness).

degree.[10] Since petitioner will not serve additional prison time as a result of the concurrent robbery sentence, any interpretation of the facts that could include error would be harmless.[11]

B. Equal protection of law

In ground five, petitioner argues that he was deprived of equal protection and due process of law because the Appellate Division, Third Department, relied upon the

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[10] The New York Penal Law provides that concurrent sentences must be imposed "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other. N.Y. PENAL LAW § 70.25(2). "Consecutive sentences may be imposed when either the elements of the crimes do not overlap or if the acts demonstrate that the defendant's acts underlying the crimes are separate and distinct. *People v. Ramirez*, 89 N.Y.2d 444, 451, 654 N.Y.S.2f 998 (1996). Distinguishing *People v. Laureano*, 87 N.Y.2d 640, 643-644, 642 N.Y.S.2d 150(1996), the Appellate Division in the instant case found consecutive sentences were warranted because

> [...] there is ample evidence of several separate and distinct acts, whereby defendant and his accomplices inflicted serious physical injury on the victim as part of their scheme to take his car before defendant decided to 'finish him off.' In particular, there is evidence that after initially assaulting the victim with a tree limb and knocking him to the ground, defendant and his accomplices kicked him and stomped him. They then used a brick, which they repeatedly threw at the victim's head so hard that it bounced off. Defendant then said 'let's finish him off,' obtained a metal tool from the trunk of the victim's car and inflicted the fatal blows. Present in this case, therefore, is evidence that the victim's 'serious physical injury was caused by an act other than the homicidal act,' which was expressly found lacking in *People v. Laureano, supra*, at 65, 642 N.Y.S.2d 150). In these circumstances, we are of the view that County Court was authorized to impose consecutive sentences for the robbery and depraved indifference murder convictions. (citations omitted). *People v. Gonsa*, 220 A.D.2d at 350.

[11] The protection against "double punishment" is necessarily implicated when a second sentence is imposed after retrial, and consideration must be given to whether the Constitution requires credit to be given for punishment already endured. *North Carolina v. Pearce*, 395 U.S. 711, 716 (1969), overruled in part on other grounds, *Alabama v. Smith*, 470 U.S. 794 (1989). Double punishment is not implicated in the circumstances of this case.

presumption of regularity regarding his presence at a *Ventimiglia*[12] hearing, whereas similarly situated defendants in the Fourth Department would have been afforded a reconstruction hearing.[13] Respondent argues that a constitutional argument was never presented to the state courts, and that petitioner solely asked the Court to decide whether the holding in *People v. Michalek*, 82 N.Y.2d 906 (1994) was applicable to cases where the record is silent as to a defendant's presence at a *Ventimiglia* hearing.[14]

In his leave application, petitioner requested intervention by the Court of Appeals "to resolve the conflicting procedures utilized by the Third and Fourth Departments in cases where the record is silent regarding a defendant's presence at a *Ventimiglia* hearing *in order to avoid an unequal application of the right to due process among the Departments.*" See Petitioner's reply memorandum at p.3 and leave application, at p.5-6. Although this court finds that petitioner did present a constitutional claim to the state Court of Appeals by "terms so particular as to call to mind a specific protected by the Constitution" (*seen Daye, supra,* at 194), the claim lacks merit.

"Not every denial of a right conferred by state law involves a denial of the right to equal protection of the laws." *Snowden v. Hughes*, 321 U.S. 1, 8 (1994). In this case, state statutory and state constitutional law affords defendants the right to be present at ancillary proceedings,

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[12] *People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981).

[13] The Third Department, Appellate Division held that the "defendant's conclusory assertion that he was not present at the pretrial *Ventimiglia* hearing, which is not supported by the record, is insufficient to rebut the presumption of regularity which attached to the proceeding." *People v. Gonsa*, 220 A.D.2d at 30 (citing *People v. Robinson*, 191 A.D.2d 523, 595 N.Y.S.2d, *lv. denied* 81 N.Y.2d 1018).

[14] In *Michalek, supra,* the Court of Appeals remitted the case for a reconstruction hearing because the record was silent as to whether the defendant had been present at either of two *Sandoval* hearings; one held in chambers pre-trial and the other shortly before the defendant was to testify at trial.

including *Ventimiglia* hearings.[15] *People v. Spotford*, 85 N.Y.2d 593, 627 N.Y.S.2d 295 (1995). Although the Court of Appeals remitted *Michalek* for a reconstruction hearing to determine whether the defendant had been present at a *Sandoval* hearing, the trial court in the instant case was not foreclosed from relying upon the presumption of regularity.[16]

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[15] A defendant has a due process right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). The New York State statutory guarantee is broader and encompasses the right to be "personally present during the trial of an indictment," including "ancillary" as well as core proceedings. NEW YORK CRIM. PROC. LAW § 260.20. Thus, the right to be present at a *Ventimiglia* hearing is derived from the New York statutory right to be present at all material stages of the trial, and not from federal constitutional principles. *See People v. Spotford*, 85 N.Y.2d 593, 627 N.Y.S.2d 295 (1993).

[16] In contrast to *Michalek*, where the record was unclear as to whether the defendant was present at *either* the in chambers *Sandoval* hearing or the reopening of that hearing before the defendant testified, the record in the instant case reflects that petitioner *was* present at the first in-chambers *Ventimiglia* hearing. It is thus apparent that the court did not routinely exclude defendants from in-chambers conferences. Furthermore, the transcript of a pre-trial discovery hearing held prior to severance of the co-defendant's cases, reveals that the trial judge was sensitive to petitioner's right to be present. The court voiced concern about the defendants being seated behind, rather than alongside, their attoneys at counsel's table. (T.1761-1762). These facts lend to the court's reliance on the presumption of regularity in the instant case.

Furthermore, petitioner's reliance on *Baxstrom v. Herold*, 383 U.S. 107 (1996) is misplaced. In *Baxstrom, supra*, the basis of the petitioner's equal protection claim was the inequality of a statutory procedure which created a classification differentiating the civilly insane from the "criminally insane." Persons civilly committed to a mental institution *after expiration of a penal sentence* were denied the availability of jury review on the question of sanity, whereas individuals *civilly* committed when no penal sentence had been involved, were expressly granted the right to *de novo* review by jury trial. *Id.* at 111. The Supreme Court noted that although equal protection "does not require that all persons be dealt with identically, [...] it does require that a distinction made have some relevance to the purpose for which the classification was made." *Id.* at 112.

Federal habeas relief is limited to determining whether a conviction violated the Constitution; it is unavailable for an alleged error in the interpretation or application of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Third Department's reliance on the presumption of regularity regarding petitioner's presence in that court's interpretation and application of state law.[17] Furthermore, a habeas court also presumes regularity in the conduct of a trial, absent substantial contrary evidence. *Benitez v. Senkowski*, 1998 WL 668079 (S.D.N.Y. Sept. 17, 1998). As such, ground five should be dismissed.

C. Change in theory of the indictment.

In ground two, petitioner argues that he was denied the right to due process and a fair trial because the People changed the theory of prosecution as to the manner and cause of the victim's death, from death resulting from the defendant's "repeatedly kicking [Grasso] in the head and body and by striking him in the head with blunt objects" to death resulting from petitioner having rammed a metal rod down the victim's throat. *See* Petitioner's memorandum at p.4. Respondent argues that petitioner failed to exhaust his state court remedies, as he only presented this argument to the state court in support of his ineffective assistance of

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[17] Moreover, any claim of selective application of a facially sound state law requires a showing that "(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitution rights, or by a malicious or bad faith intent to injure the person." *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992). Petitioner can not show an element of intentional or purposeful discrimination for the Third Department interpretation and application of the law.

counsel claim,[18] and not as evidence of an independent due process violation.[19] *See* Respondent's memorandum at p.13.

This court agrees that petitioner failed to fairly apprise the state courts of his constitutional due process claim regarding a change in theory of prosecution. Federal courts may address the merits of claims that were procedurally defaulted in state court only upon a showing of cause for the default and prejudice to petitioner, *Bossett v. Walker*, 41 F.3d at 829, or if petitioner can establish that he is "probably...actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Although cause may be demonstrated if the procedural default is a result of ineffective assistance of counsel, *Bossett*, 41 F.3d at 829 (citing *Murray v. Carter* 477 U.S. 478, 488 (1986)(citations omitted), petitioner has not raised ineffective assistance of counsel as a ground for relief in the instant habeas corpus petition. Nor does he assert ineffective assistance of counsel as cause for procedural default. To the extent that petitioner might seek to raise ineffective assistance of appellate counsel for failure to raise constitutional issues on appeal, this court notes that he has not exhausted state court remedies as to this claim.[20] Since

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[18] The Third Department found that petitioner had not been deprived of effective assistance of counsel. It did not specifically refer to counsel's failure to object to the People's alleged change in theory of prosecution.

[19] Respondent notes that the due process claim was unpreserved by objection at trial, and thus would be procedurally barred from review in this proceeding under the independent and adequate state grounds doctrine.

[20] Under New York law, the remedy for claims of ineffective assistance of appellate counsel is a petition for a writ of error *coram nobis* to the Appellate Division. *See Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994)(citing *People v. Bachert*, 69 N.Y.2d 593, 516 N.Y.S.2d 623 (1987)). Petitioner has not exhausted this state court remedy.

Morever, petitioner would have been unsuccessful had he attempted to argue that appellate counsel was ineffective for failing to present the constitutional nature of his claim in his leave application to the New York Court of Appeals. Applications seeking leave to appeal are collateral, and therefore there is no constitutional right to effective assistance of counsel at that stage. *See Coleman v. Thompson*, 501 U.S. 722,

petitioner has not even attempted to show cause, and the evidence does not suggest that he is actually innocent, this court need not address whether he suffered actual prejudice. As such, ground two should be dismissed.

However, even if this court were to address the merits, the undersigned would not agree that the People changed their theory of prosecution. The court charged the jurors using the language of the indictment, i.d. that petitioner acting in concert with Lussier and Meehan "struck [Grasso] about the head with blunt objects." (T.1576; see also T.1577 ("struck him in the head with blunt objects")). The evidence adduced at trial included the defendants kicking and stomping on the victim's face and head, bashing bricks on his head, and petitioner stabbing a metal object down his throat. Bricks and rods can both be considered blunt objects and the head includes the face and mouth. Therefore, ground two should be denied and dismissed.

D. Introduction of evidence regarding uncharged crimes and bad acts

In ground three, petitioner alleges that the introduction of uncharged crime and bad act evidence showing his propensity to engage in criminal conduct violated his constitutional right to due process, to confront and cross-examine witnesses, to a fair trial and to present a defense. Respondent argues that petitioner did not assert these constitutional claims in his Third Department appellate brief nor in his application seeking leave to the state Court of Appeals. This court agrees.

In his letter application seeking leave to appeal, petitioner contended that he had been deprived of a fair trial as a result of improperly admitted evidence indicating that he had committed larceny by trick, theft of services, petit

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752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)(where there is no constitutional right there can be no deprivation of effective assistance).

larceny and assault.[21] The question presented to the Court of Appeals was whether the Third Department had improperly created a new category of uncharged "petty" crimes that enjoyed a relaxed standard of admissibility. Petitioner challenged the Appellate Division's decision for having been vague and indefinite, and asked the Court for clarification as to the "types" of uncharged crimes that would be admissible. *See* Petitioner's leave application, at 8. Since no federal constitutional question was presented, the claims raised in the instant petition are unexhausted.[22]

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[21] At trial, testimony was elicited that petitioner had convinced an elderly couple to put them up, feed them and gave them $200 for bus tickets to New York, which he equates to eliciting testimony of theft of services; stole $75 form Lussier and Meehan while working for the Mayflower trucker, which he equates to petty larceny; and assaulted Lussier and fought with Meehan, which he equates to assault. *See* Petitioner's application at p.6, referring to Appellate brief at p.40-41.

[22] In Point I of his appellate brief, petitioner addresses the introduction of uncharged crimes, bad acts and immoral conduct. In the first sentence of this 31 page argument, petitioner argues that he was deprived of the right to a fair trial, and references the Sixth and Fourteenth amendments of the United States Constitution. See Petitioner's appellate brief, at p.26. However, even if this court were to find that this sufficiently alerted the state court to his constitutional argument and that petitioner thus exhausted his state court remedies, the claim would be found to lack merit. A federal court examining a habeas corpus petition does not have jurisdiction to interpret whether the state courts correctly applied state law. *Estelle v. McGuire*, 502 U.S. at 71-72. An erroneous evidentiary ruling does not generally rise to the level of constitutional error sufficient to warrant habeas corpus relief. *Sutton v. Herbert*, 39 F.Supp.2d 335, 338 (S.D.N.Y. 1999)(citing *Ayala v. Leonardo*, 20 F.3d 83, 91 (2d Cir. 1994). A writ should issue only if the petitioner can show that the evidentiary error deprived him of a fundamentally fair trial, which petitioner has not established in this case. *See id.* at 338 (citing *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir.) *cert. denied.*, 464 U.S. 1000 (1983)). The evidence established that petitioner was with the victim and the co-defendants before the crime; was with the co-defendants after the crime; scrubbed muddy and bloody sneakers; assumed the victim's name to sell his car; cleaned the car and offered a deer kill as the explanation for the blood in the trunk; fled the state with the co-defendants; provided people he met with false names and invented stories about his past; and avoided returning to New York state.

As stated above, petitioner did not attempt to demonstrate cause for his procedural default. Since no cause was demonstrated, and the state court records do not suggest that petitioner is actually innocent, it is unnecessary for this court to determine whether he has suffered actual prejudice. *Stepney v. Lopes*, 760 F.2d 40, 45 (2d. Cir. 1985). Therefore, ground three should be denied and dismissed.

3. Procedural misconduct.

In ground four, petitioner argues that he was deprived of the right to a fair trial as a result of prosecutorial misconduct, and that the state court's decision is contrary to established federal law.[23] Petitioner argues that the prosecutor 1) repeatedly vouched for the credibility of his witnesses; 2) exceeded the bounds of fair advocacy by repeatedly characterizing petitioner as a liar on summation; 3) elicited irrelevant and highly prejudicial character evidence; 4) improperly commented on the petitioner's failure to testify and implied he should have called witnesses; 5) shifted the burden of proof; and 6) mischaracterized the evidence, argued facts not in evidence and acted as an unsworn witness. *See* Petitioner's memorandum, at 11.

A federal court's review of a prosecutor's action on habeas corpus is very limited. To obtain relief, a habeas petitioner must show that the prosecutor engaged in "egregious misconduct ... amount[ing] to a denial of constitutional due process." *Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990)(quoting *Donnelly v. DeChristofo*, 416 U.S.

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[23] Petitioner raised prosecutorial misconduct on direct appeal, and in his application seeking leave to appeal to the New York Court of Appeals. The Appellate Division, Third Department, concluded that the "prosecutor's remarks were not so egregious as to deprive defendant of a fair trial." Although the Appellate Division characterized some of the prosecutor's comments as "overzealous," the court found no evidence that the remarks had a "decided tendency to prejudice the jury." *People v. Gonsa*, 220 A.D.2d at 249.

634, 647-648 (1974)). Petitioner must prove actual prejudice such that the prosecutor's misconduct "had a substantial and injurious effect or influence in determining the jury's verdict." *Bentley v. Scully*, 41 F.3d 818, 824 (2d Cir. 1994), *cert. denied*, 516 U.S. 1152 (1996). The allegedly improper conduct must be reviewed within the context of the entire trial to determine whether it amounted to "prejudicial error." *Strouse v. Leonardo*, 928 F.2d 548, 557 (2d Cir. 1991). The court must consider "the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." *Id.* (citing *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990)). See also *Tankleff v. Senkowski*, 135 F.3d 235, 252 (2d Cir. 1998).

Petitioner claims that the prosecutor repeatedly made himself into an unsworn witness, vouched for Lussier's credibility and interposed the credibility of his office. This court does not agree that vouching occurred in all instances cited by petitioner in his memorandum at pages 12-13. However, even if one or more of the prosecutor's comments constituted improper vouching,[24] this court finds that such conduct did not constitute "egregious misconduct ... amount[ing] to a denial of constitutional due process." *Floyd v. Meachum*, 907 F.2d at 353. The prosecutor's own comments mitigated any prejudicial effect. In his opening statement, the prosecutor repeatedly advised the jurors that

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[24] This court agrees that it was improper for the prosecutor to ask the jurors to consider what motivation Lussier would have to lie, given that the District Attorney's Office would call off the deal if they found out he was lying. The jurors could interpret this as the District Attorney's office vouching for Lussier's truthfulness. This court also agrees that it was improper for the prosecutor to ask the jurors "what motivation [...] the DA's [would] office have to try and prosecute someone if they were innocent?" (T.1518). However, any suggestion of vouching was mitigated by the prosecutor's own comments on summation, e.g. that he was not a character witness for Lussier, and that the jurors would have to evaluate Lussier's credibility, (T.1507-1507; 1510).

it was up to them to evaluate Lussier's credibility.[25] He conceded that Lussier would lie to help himself. (T.1515). On summation, he reiterated that he was not a character witness for Lussier, telling the jury "you all know what he is." (T.1508). Thus, even if any one statement could be considered vouching, there was no substantial or injurious effect or influence on the jury's verdict. *Bentley v. Scully*, 41 F.3d at 824.

Petitioner argues that the prosecutor exceeded the bounds of fair comment by repeatedly calling him a liar on summation, and equates the prosecutor's conduct to that condemned by the Second Circuit in *Floyd v. Meachum, supra.* This court does not agree. *Floyd v. Meachum* was one of the "rare cases where the improper comments in a prosecutor's summation were so numerous and, *in combination*, so prejudicial that a new trial was required." *Id.*, 907 F.2d at 348. In *Floyd*, the Second Circuit emphasized that there was *cumulative* prosecutorial error, consisting of "repeated and escalating misconduct from initial closing to summation." Id. at 353. In *Floyd*, the prosecutor called the defendant a liar dozens of times and equated his lies with proof of guilt beyond a reasonable doubt. She also diluted the State's burden of proof by referring to the Fifth Amendment as a shield for the innocent and not for the guilty, undermined the presumption of innocence, and asked the jury to pass on her personal integrity and professional ethics. The Court noted that, standing alone, each instance of prosecutorial misconduct did not justify reversal, but the "effect of all of them requires it." *Id.* at 357.

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[25] *See, e.g.*, T.80 ("you can evaluate his testimony yourselves"); T.84 ("and his testimony you will evaluate for what you think it is worth"); T.93 ("On the issue of credibility, you are certainly allowed to consider [Lussier's involvement in robbing and stabbing another man] in terms of Mr. Lussier's truthfulness."); T.94 ("I am certainly not standing here as a character witness for Michael Lussier [...]; T.95 ("It is going to be up to you to assess his credibility. Observe his demeanor. Listen carefully to what he says.").

The prosecutor's conduct in the instant cases is **not** comparable. On summation, defense counsel attacked Lussier's credibility and suggested that there was insufficient corroboration to establish proof beyond a reasonable doubt. He argued that Lussier was a violent thief, who told so many lies in order to benefit himself that he could not be believed at all. (T.1428; 1432-1435; 1449-1451; 1457). On summation, the prosecutor acknowledged that Lussier had lied to help himself. (T.1510; 1515). However, he also asked the jury to also consider the lies petitioner told to others after the murder as evidence of his involvement in the crime and his consciousness of guilt. (T.1531-1532). The prosecutor referred to the fact that petitioner had assumed the victim's name to sell the Beretta; explained that the blood in the trunk came from a deer; and told many other lies concerning his identity and past to the Wrights, Michael Barkley and Thomas Burrows. He asked the jurors to consider the witnesses' testimony describing petitioner's "cocky, arrogant attitude" in the days following the murder. (T.1533).

The "use of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or likely to be inflammatory." *Floyd v. Meachum,* 907 F.2d at 354 (quoting *United States v. Peterson,* 808 F.2d 969, 977 (2d Cir. 1987). Particularly egregious in *Floyd,* and absent in the present case, was the prosecutor equating a defendant's lies to proof beyond a reasonable doubt as to his guilt. *Id.* at 350; 354.

Petitioner also argues that the prosecutor mischaracterized evidence by implying that the victim's blood had been found on his clothing. In his opening, the prosecutor stated that there was human blood on a pair of blue jeans that petitioner was wearing, and on the shorts and tops Lussier and Meehan were wearing. (T.70). At trial, several witnesses testified that Meehan and Lussier wearing shorts. (T.556-557; 573; 638-641; 664-665; 766). Defense

witness Richard Hamm testified that petitioner was wearing jeans when he saw him between 4:30 and 5:00 p.m. the afternoon of the murder. (T.1282-1283). Lussier identified the blue jeans as those worn by the petitioner. (T.300). Two pair of shorts and one pair of jeans were recovered from the Thomas' residence. Although the blood found on the blue jeans had degraded due to environmental conditions and was unable to be analyzed (T.1156; 1181-1183; 1187), the blood on the co-defendants' clothing affirmatively matched the DNA of the victim's parents. Given this evidence, the prosecutor did not mischaracterize the evidence by referring to the "blood evidence" as "highly incriminating." (T.1521).

Finally, petitioner claims that the prosecutor violated his Fifth and Fourteenth amendment right to remain silent by improperly commenting on his failure to testify. He refers to the fact that the prosecutor told the jurors that they should not judge petitioner by his appearance in the courtroom and that they did not know "anything about him, about what type of person he is other than the evidence [...] heard in this case. (T.1522; 1532). These comments did not impermissibly imply that petitioner ought to have testified or presented evidence. Rather, this court views the prosecutor's comments as a reminder to the jurors that their verdict is to be based on the evidence. Similarly, this court does not find that the prosecutor shifted the burden of proof by stating "there's not one shred of evidence to support that [petitioner] was not involved in this." (T.1462-1463; 1530). This comment was more a suggestion that, given the evidence presented, there was no reasonable doubt as to petitioner's guilt. (T.1463).

However, even if any of these comments were improper, this court finds no substantial and injurious effect or influence in determining the jury's verdict. No objections were lodged, and therefore no curative instructions were given. In any event, the court's thorough charge to the jurors cured any potential prejudice. The court instructed the jurors that the attorneys' comments were not evidence,

but their own interpretation of the evidence; that attorneys are advocates for their clients, and it is the jurors' obligation to impartially judge the facts and accept or reject the attorneys' interpretations based on their own recollection of the evidence; and reminded them that they were the sole and exclusive judges of the facts. (T.1538-1539; 1546). The court provided guidelines for evaluating credibility, including prior inconsistent statements, criminal history, and promised benefits for testifying. (T.1546-1548; 1554-1555).

The jurors were instructed that the People must prove their case beyond a reasonable doubt, that the burden of proof never shifts to the defendant, and that the People must prove that there is no other reasonable explanation from the evidence presented other than that of guilt. (T.1536; 1542-1543; 1564-1566). They were told that the defendant is never required to prove his innocence, that by pleading guilty he denies guilt, and that no unfavorable inference could be drawn from the fact that petitioner did not testify. (T.1542; 1550). Lussier was charged as an accomplice as a matter of law, and the jurors were told that his testimony must be viewed with "suspicion" and corroborated. (T.1561). They were instructed to render a verdict without concern about the parties or public's reaction to the outcome. (T.1544).

"A criminal conviction is not to be lightly overturned on the basis of a prosecutor's inappropriate comments standing alone." *United States v. Young*, 470 U.S. 1, 11-12 (1985). Prosecutorial misconduct on summation is grounds for reversal only when there is substantial prejudice to the defendant. *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2d Cir. 1991). Given the court's instructions to the jury, and in light of the totality of evidence presented at trial, this court finds that the prosecutor's summation did not have a substantial and injurious effect or influence in determining the jury's verdict. *Cf. United States v. Modica*, 663 F.2d 1173 (2d Cir.

1981), *cert. denied* 456 U.S. 989 (1982). Therefore, count four should be dismissed.

WHEREFORE, based on the findings in the above Report it is

RECOMMENDED that the petition be **DENIED** and **DISMISSED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d cir. 1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV.P.72, 6(a), 6(e), and it is

ORDERED that the state court records herein be returned directly to the office of the Assistant Attorney General at the conclusion of these proceedings. He has agreed to make them available for any appellate review.

Dated: August 13, 1999
Syracuse, New York

5/ Gustave J. DiBiano
United States Magistrate Judge

U.S DISTRICT COURT - N.D. OF N.Y.
FILED
AUG 13 1999
AT _____ O'CLOCK _____
Lawrence K. Baerman, Clerk - Syracuse

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS GONSA,
Petitioner,

-v- 97-CV-1828
(FJS)(GJD)

JAMES STINSON, Superintendent at
Great Meadows Correctional Facility,
Respondent.

APPEARANCES: OF COUNSEL,

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FREDERICK J. SCULLIN, JR., D.J.:

MEMORANDUM-DECISION AND ORDER

Introduction

Petitioner Thomas Gonsa, presently incarcerated in Great Meadow Correctional Facility, brings this habeas corpus petition pursuant to 28 U.S.C. §2254 complaining of the conviction entered against him by the New York State County Court of Broome. Petitioner was sentenced to a total indeterminate term of thirty-three and one-third years to life

imprisonment for two counts of second degree murder, one count of first degree robbery and one count of third degree criminal possession of stolen property. The New York State Appellate Division, Third Department affirmed Petitioner's conviction and sentence on June 13, 1996. People v. Gonsa, 644 N.Y.S.2d 346 (N.Y. App. Div., 3rd Dep't. 1996).[1] The New York Court of appeals denied leave to appeal on December 13, 1996. People v. Gonsa, 677 N.E.2d 297 (N.Y. 1996)[2]

Petitioner filed a habeas corpus petition on December 12, 1997, asserting five grounds for relief: (1) Petitioner's rights under the double jeopardy clause of the U.S. Constitution were violated; (2) the prosecution failed to provide sufficient notice regarding a change in theory of the murder indictment; (3) impermissible evidence of uncharged crimes and prior bad acts was admitted at trial; (4) prosecutorial misconduct occurred; and (5) Petitioner's equal protection rights were violated with regard to a reconstruction hearing.

Presently before the Court is the Report-Recommendation of the Honorable Magistrate Judge DiBianco, dated August 13, 1999, recommending that the

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[1] Petitioner raised five issues in his appeal: (1) evidence of uncharged crimes, prior bad acts and flight of Petitioner was improperly admitted by the trial court; (2)prosecutorial misconduct occurred; (3) the right to a fair trial was denied due to ineffectiveness of counsel; (4) the accomplice testimony was no corroborated and was improperly admitted; and (5) consecutive sentences were imposed for charges that arose from a single incident.

[2]Petitioner sought review on four issues; (1) whether a conflict of laws exists between the Third and Fourth Appellate Departments in New York State with regard to Ventimiglia hearings; (2) whether the Appellate Division erred in creating a new standard for admitting evidence regarding uncharged crimes; (3) whether a person can be sentenced five times for four crimes; and (4) whether the proper standard of review was used for determining whether prosecutorial misconduct occurred.

petition be dismissed. Petitioner filed timely objections specifically challenging each finding of the Magistrate Judge's Report-Recommendation. In addition, Petitioner alleges that the Magistrate Judge's factual section contained numerous errors which invalidated his legal conclusions.

Pursuant to 28 U.S.C. 636(b)(1), a district court must make a de novo determination of those portions of a Magistrate Judge's Report-Recommendation that are specifically objected to by a party. Thus, this Court will address Petitioner's relevant objections seriatim.

Facts

Petitioner was convicted for the July 1991 murder of Robert Grasso; also convicted were co-defendants, Michael Lussier and Dennis Meehan.[3] The three men plotted to "disable" the victim and then steal his car. However, as a result of being severely beaten by all three men and having a metal rod shoved down his throat by Petitioner, the victim was killed. After the murder, Petitioner, Lussier and Meehan went to a friend's apartment in Endicott, New York, where Lussier and Meehan disposed of the body. The three men then fled New York. Lussier and Meehan turned themselves in to authorities on or about September 1991. Petitioner was apprehended in Vermont in early 1992.

I. Misreading of Facts

Petitioner alleges that certain factual portions of Magistrate Judge DiBianco's Report-Recommendation are incorrect and/or inaccurate. Specifically, he claims the following: (1) Magistrate Judge DiBianco incorrectly

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[3] Lussier entered into a plea agreement with the prosecutor in exchange for his testimony against Petitioner and Meehan. Meehan was convicted of two counts of second degree murder, robbery and criminal possession of stolen property after a jury trial on or about December 1992.

recounts the trial testimony describing the appearance of Petitioner when he arrived at the apartment in Endicott, New York; (2) Magistrate Judge DiBianco misstates a co-defendant's testimony; (3) Magistrate Judge DiBianco relies upon testimony stricken from the record; and (4) Magistrate Judge DiBianco incorrectly summarizes trial testimony.

A. Testimony by Witnesses Regarding Petitioner's Appearance on the Night of the Murder

After the murder, it is undisputed that Petitioner, Meehan and Lussier went to and apartment in Endicott, New York, where they spent the night. The Magistrate Judge, in his Report-Recommendation, summarized the witnesses' description of defendants. He stated that "several people present in the apartment testified that the three [Petitioner, Lussier and Meehan] were muddy when they arrived." (Magistrate Judge Report-Recommendation at 7, fn. 6, hereinafter "Report"). Petitioner objects to the characterization that "several" People saw that Petitioner and co-defendants were muddy despite the fact that one woman testified that "they were all dirty," (Record on Appeal at 628, hereinafter "R"); another testified that Lussier, Meehan, and Petitioner arrived in a gray Beretta and that "most of them were wearing shorts and they were all muddy," (R. at 701-02); and finally, a third testified that they were "a little muddy" and when asked whether all three were muddy, he responded, "Yes." (R. at 737.) Thus, the Magistrate Judge's statement that "several" People testified that Petitioner was muddy was correct.[4]

[4] Petitioner also claims that the trial testimony regarding whether Petitioner was wearing jeans when he arrived at the Endicott apartment is unclear. He claims, therefore, that the Magistrate Judge's conclusion that he was wearing jeans was incorrect. While one women testified that Petitioner was wearing shorts and a t-shirt (R. at 630-631), other witnesses testified that Petitioner was wearing jeans on the day of the murder. (R. at 300, 1283.) Therefore, the Magistrate Judge's assignment of ownership was supported by the testimony.

B. Lussier's Testimony

Petitioner claims that the trial transcript does not support the statement made in the Magistrate Judge's Report-Recommendation that Petitioner "stab[bed] the metal object up and down in [the victim's] mouth two times" and that the victim "was missing his front teeth." (Report at 6-7). This Court disagrees. According to the trial transcript, Lussier actually testified that Petitioner stabbed the metal rod "up and down. Not too many times...maybe two full up and down motions," and that "I believe [the victim] was missing both front teeth." (R. at 182-83.) Therefore, the Magistrate Judge was correct in his characterization of Lussier's testimony.

C. Testimony Stricken from the Record

Magistrate DiBianco stated in his Report-Recommendation that "Lussier testified that Petitioner looked concerned." (R. at 202-03.) Petitioner alleges that this testimony was stricken from the record. Petitioner is correct. Thus, the Magistrate Judge incorrectly included this testimony in his facts. However, the error is immaterial because even without this statement, the weight of the evidence supports the Magistrate Judge's findings.

D. Additional Alleged Inaccuracies in the Magistrate Judge's Report-Recommendation

Petitioner alleges that references to the trial transcript made by the Magistrate Judge are inaccurate. For example,

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Petitioner also suggests that even if he were wearing the jeans, it is significant that the blood stains on the jeans were not as obvious or as numerous as the blood stains found on other clothing left at the apartment. Even so, the blood stains on the jeans were found to be human blood. (R. at 1016.)

the Magistrate Judge states that Petitioner "started talking loudly" (Report at 5) to the victim when the transcript indicates "a little louder." (R. at 179.) In addition, the Magistrate Judge stated that "the van could not be repaired" (R. at 10.) when the testimony was the "we didn't have the money to get [the van] going again." (R. at 208.) This Court does not find that these statements are "inaccurate," rather they are characterizations made by the Magistrate Judge that are supported by the testimony. Furthermore, even if they could be considered slight mischaracterizations, they are insignificant and have no material effect on the conclusions reached by the Magistrate Judge.

Petitioner also makes allegations that other findings in the Report-Recommendation are inaccurate. However, this Court finds that the remaining allegations are supported by the trial transcript or are typographical errors.[5]

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[5]Petitioner questions the following references, but they are all supported by the evidence in the Record: reference to the shattering of the car window is supported by a question asked of and answered by Lussier (R. at 187.); statement that Petitioner told Vicente to calm down and not to worry, because it was just deer blood is supported by Vincente's testimony (R. at 781.); reference to Petitioner discussing a concocted alibi may be concluded from Lussier's testimony (R. at 220-221); reference to Petitioner's next ride being with Thomas Burrows is not supported by the transcript as actually being Petitioner's "next" ride, however, the conclusion that Burrows gave Petitioner a ride is accurate (R. at 1066-67) as is the reference to false information given to Burrows by Petitioner. Id.

Other alleged inaccuracies are merely the result of typographical errors. For example, and indication that by pleading guilty he denies guilt is missing the word "not" between pleading and guilty. (Report at 29.) A reference to the blows to the victim's head being consistent with someone stomping on his head is actually at page 1221 of the Record, not 1222 as cited. In addition, a reference made to Petitioner refusing to learn how to be a truck driver because the run was to New York is actually found on page 1068 of the transcript, not 1078 as indicated. Finally, a reference made to Lussier being confronted with a confession he made to Shepardson occurs at pages 260-261 of the transcript, not pages 278-80.

Therefore, this Court find that all of Petitioner's allegations regarding the misreading of facts are either unsupported or are immaterial to the legal conclusions reached by Magistrate Judge DiBianco in the Report-Recommendation.

II. Double Jeopardy

Petitioner was convicted of one county of robbery, one count of depraved indifference murder, one count of felony murder and one count of criminal possession of stolen property. The New York State Supreme Court sentenced Petitioner to 25 years to life for each murder conviction, a term of 8-1/3 to 25 years for robbery and 2-1/3 to 7 years for criminal possession of stolen property. The murder sentences were to run concurrently, the robbery sentence to run consecutively to both murder sentences and the criminal possession sentence to run concurrently with the robbery sentence. The Appellate Division, Third Department, clarified that the robbery sentence was to run consecutively to the depraved indifference murder sentence only. Gonsa, 644 N.Y.S.2d at 349. Petitioner argues that double jeopardy was violated because under New York Penal Law, the robbery and felony murder convictions merge. N.Y. PENAL LAW § 70.25. Thus, Petitioner claims that because the murder sentences must run concurrently and the felony murder and robbery sentences must run concurrently, the consecutive sentences for robbery and depraved indifference murder are multiple sentences for the same offense. Magistrate Judge DiBianco determined that Petitioner's double jeopardy claim is without merit because it is permissible to impose consecutive sentences for convictions of robbery and depraved indifference murder. Petitioner objected to this finding.

Before looking at whether double jeopardy has been violated, the issue of whether the felony murder and robbery charges merge to a single offense must be

addressed. While the New York statute may seem to indicate that these charges should merge, the New York Court of Appeals has held that with regard to felony murder, "the underlying felony is not so much an element of the crime but instead functions as a replacement for the ... intent necessary for common-law murder." People v. Berzups, 402 N.E.2d 1155, 1160 (N.Y. 1980). Only where the facts indicate the crimes are incidental and inseparable can the merger doctrine apply. People v. Lucas, 406 N.Y.S.2d 1019, 1021 (Sullivan Co. Ct. 1978)(holding that charges of robbery, kidnapping, intentional murder and felony murder do not be merge because they were based on separate acts). When a murderous act is an afterthought and not related to the initial crime of robbery, consecutive sentences may be imposed. People v. Tanner, 282 N.E.2d 98 (N.Y. 1972)(holding that consecutive sentences allowed where murder of victim was an "unnecessary afterthought" because robbery was completed and victim was offering no resistance).

In this instance, the Appellate Division found that there was evidence that the robbery and depraved indifference murder charges were not based on the same acts. Gonsa, 644 N.Y.S.2d at 350. Thus, because the crimes are based on separate acts, they are not inseparable or incidental and do not merge.

The Magistrate Judge then goes on to correctly explain that when a defendant's acts underlying a crime are separate and distinct, consecutive sentences may be imposed. People v. Ramirez, 677 N.E.2d 722, 725 (N.Y. 1996). Therefore, consecutive sentences may be imposed when a defendant is convicted of two separate murder charges. People v. Mebert, 599 N.Y.S.2d 938 (N.Y. App. Div., 2nd Dep't. 1993)(where defendant is convicted of both felony murder and intentional murder, intentional murder sentence may run consecutively to underlying felony sentence if intentional murder conviction is based on a "separate and distinct" act other than the act relief upon for the underlying

felony conviction); People v. Doyle, 462 N.Y.S.2d 138, 139 (N.Y. Sup. Ct., Bronx Co. 1983)(holding that person convicted of intentional murder, felony murder and sexual abuse may be sentenced to consecutive sentences for intentional murder and sexual abuse even though felony murder and sexual abuse sentences must merge because the homicidal act was separate and distinct from the act constituting sexual abuse). As mentioned above, the Appellate Division found that the facts supported the conclusion that the underlying acts relied upon for the depraved indifference conviction and the robbery conviction were separate and distinct. Gonsa, 644 N.Y.S.2d at 350. Thus, the trial court may, in its discretion, impose consecutive sentences.

III. Change in Theory of Indictment

Magistrate Judge DiBianco recommended that Petitioner's claim regarding inadequate notice of a change in the theory of the indictment be dismissed because Petitioner had failed to exhaust available state remedies. Petitioner objected on the grounds that it was included within other claims made on appeal.

As the Magistrate Judge stated, it is well settled that a state prisoner must exhaust all available state remedies before a writ of habeas corpus can be issued by the federal courts. Ellman v. Davis, 42 F.3d 144, 147 (2d Cir. 1994). An exception can only be made when the prisoner can show that there was cause for the default and that he suffered actual prejudice because of the federal law violation. Restrepo v. Kelly, 178 F.3d 634, 640(2d Cir. 1999). A Petitioner does not have to "cite Chapter and verse of the Constitution to satisfy the exhaustion rule." Levine v. Comm'r of Correctional Serv., 44 F.3d 121, 124 (2d Cir. 1995).

Magistrate Judge DiBianco correctly found that neither of Petitioner's appeals included this claim. He also found that Petitioner provided no explanation for why this claim was not raised. Furthermore, Petitioner's appeals contain no language that supports that this claim was raised collaterally. Accordingly, the Magistrate Judge's recommendation to dismiss this claim is accepted by this Court.

Even if this Court were to address the merits of Petitioner's claim, it would likewise fail. Petitioner relies upon Berger v. US, to show that "the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial." Berger v. US, 295 U.S. 78, 82 (1935). However the Supreme Court also held that no prejudice exists where "the allegation and proof substantially correspond" or where the variance did not mislead defendant during the trial. Id. at 83. Also, the Second Circuit has allowed flexibility in offering proof as long as the defendant has been given notice of the "core of criminality to be proven at trial." U.S. v. Wozniak, 126 F.3d 105, 109 (2d Cir. 1997). In fact, one can not expect proof offered at trial to be an exact replica of the charges in the indictment. Id.

While the Petitioner's indictment stated that the victim's death was caused by "kicking him in the head and...body and striking him in the head with blunt objects," (R. at iv), the proof offered at trial also included testimony regarding a long metal object as a possible cause of death. However, this evidence did not change the underlying charge of murder for which the Petitioner was convicted. Thus, even though evidence of another possible cause of death was offered, the defendant was not mislead or prejudiced in any way. He was put on notice to defend against a murder charge and that is what the evidence

supported. Therefore, this Court accepts the Magistrate Judge's recommendation to dismiss this claim.

IV. Uncharged Crimes and Previous Bad Act Evidence

Petitioner claims that his rights to due process, to confront and cross-examine witnesses, to a fair trial and to present a defense were violated because the trial court admitted evidence regarding Petitioner's alcohol and drug dependence and events that occurred after Petitioner fled New York. The Magistrate Judge again found that this claim had not met the exhaustion requirements. Petitioner objected and this Court agrees that it is possible to read Petitioner's appeals to include such a due process claim, therefore this Court will review that issue.

The standard of review to be used in a habeas corpus petition with regard to an evidentiary error is whether the Petitioner can show that he did not receive a "fundamentally fair trial." Blissett v. Lefevre, 924 F.2d 434 (2d Cir. 1991); Taylor v. Curry, 708 F.2d 886, 891 (2d Cir. 1983). In Blisett, the Second Circuit held that if a plaintiff has the opportunity to attack a witness' testimony and to introduce evidence to invalidate the testimony, no deprivation of a fair trial occurred. Blissett at 439. In any event, evidence regarding consciousness-of-guilt may be introduced at trial. U.S. v Amuso, 21 F.3d 1251 (2d Cir. 1994).

Petitioner had every opportunity to refute the testimony regarding his activities after he fled New York and to attack the credibility of the witnesses who provided such testimony. Moreover, the evidence introduced at trial was not that of prior bad acts, it was with regard to his activities after the crime was committed and was committed and was used to establish that Petitioner knew he was guilty of criminal activity and fled New York to avoid arrest. The evidence in this instance was offered to show defendant's

activities after the crime was committed, not to show a propensity towards criminal behavior. Because the evidence was introduced to show defendant's consciousness-of-guilt, it was correctly admitted by the trial court and Petitioner's claim of due process violation based on the admission of such evidence should be dismissed.

V. Prosecutorial Misconduct

Petitioner argued that prosecutorial misconduct occurred during the trial because the prosecutor vouched for the credibility of a witness, elicited irrelevant and inflammatory character evidence unrelated to the crimes, implied Petitioner's guilt because he did not testify and shifted the burden of proof to Petitioner. Magistrate Judge DiBianco determined that the challenged statements made by the prosecutor during the trial did not deprive Petitioner of a fair trial. Petitioner contends that this was in error because the cumulative effect of the statements was not considered.

As stated by the Magistrate Judge, the standard a federal court must use when reviewing a prosecutor's conduct is very narrow and only due process issues are to be examined. Floyd v. Measchum, 907 F.2d 347, 353 (2d Cir. 1990). When conducting this review, a court must determine whether the cumulative effect of the prosecutor's conduct was so prejudicial that Petitioner was denied a fundamentally fair trial. Id. In making such a determination, a court must look at the severity of the misconduct, the measures used to correct the misconduct and the certainty of conviction if the improper remarks were not made. Id. at 355.

A review of the record supports the Magistrate Judge's findings that the prosecutor's conduct did not deny Petitioner a fair trial. While there may be some cumulative

effect to the prosecutor's statements and characterization, it did not rise to the level necessary to declare Petitioner's trial unfair. Also, the trial court gave detailed instructions to the jury that the attorneys' summations were not evidence and that the burden of proof was on the State to prove Petitioner guilty beyond a reasonable doubt. Further instructions were also provided regarding establishing the credibility of witnesses as well as an assumption that Petitioner was innocent until proven guilty and that no significance could be attached to the fact that Petitioner did not testify. Finally, even if the prosecutor's comments were found to have a substantial cumulative impact, the evidence presented at trial was not so close that the effect would have had a substantial cumulative impact, the evidence presented at trial was not so close that the effect would have had a substantial impact on the verdict. Tankleff v. Senkowski, 135 F.3d235, 253 (2d Cir. 1998). Therefore, the Magistrate Judge's recommendation to dismiss this claim is accepted.

VI. Equal Protection Issue

Finally, Petitioner claims that because a split among Appellate Departments in New York exists as to the right to a reconstruction hearing when the record is not clear as to whether a defendant was present at a Ventimiglia hearing, his equal protection rights have been violated.[6] Petitioner claims that when the record is silent about whether a defendant is present at a Ventimiglia hearing, only the Third Department makes a presumption of regularity. All other Appellate Divisions in New York, require a reconstruction hearing on the issue. The Magistrate Judge determined that Petitioner had adequately raised the issue of this claim, but that the Third Department's decision to rely on a presumption of regularity with regard to a defendant's

[6] A Ventimiglia hearing is held prior to trial to determine whether evidence regarding uncharged crimes may be admitted at trial. 33 N.Y. JUR. 2D *Criminal Law* §2104.1 (1999).

presence is an interpretation of state law and cannot be overturned on habeas review. Petitioner objected to this determination because there is a clear disparity between the Appellate Divisions in New York State and there is no rational basis for the distinction made between defendant's in the Third Department and other departments in New York State.

The Supreme Court has held that the Fourteenth Amendment does not require that "all persons in the United States...benefit [from] the same laws and the same remedies. Missouri v. Lewis, 101 U.S. 22, 31 (1879) (holding that different appeals procedures within the State of Missouri do not violate equal protection requirements). Id. at 29. Thus, as long as all people within a certain area are treated equally, equal protection rights are not violated. North v. Russell, 427 U.S. 328, 338 (1976).

In this instance, the Third Department has consistently held that there is a presumption of regularity with regard to official court proceedings and unless a defendant presents evidence to the contrary, that presumption is not negated. People v. Augustine, 654 N.Y.S.2d 179, 184 (N.Y.App.Div., 3rd Dep't. 1997) leave to appeal denied 682 N.E.2d 982 (N.Y. 1997)(regarding defendant's presence at both Sandoval and Ventimiglia hearings). Accordingly, even though other departments within New York State have required a reconstruction hearing in similar circumstances,[7] the Fourteenth Amendment does not require the Third Department to do so as well.

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[7]See e.g., People v. Rodriguez, 627 N.Y.S.2d913 (N.Y. App. Div., 1st Dep't. 1995); New York v. DeWitt, 665 N.Y. App. Div. 2nd Dep't. 1997); People v. Snell, 612 N.Y.S.2d 10005 (N.Y. App. Div., 4th Dep't. 1994).

Conclusion

After carefully considering the entire file, the submissions of the parties and the applicable law, it is hereby

ORDERED, that Magistrate Judge DiBianco's Report-Recommendation dated August 13, 1999, is ACCEPTED as MODIFIED; and it is further

ORDERED, that Petitioner's habeas corpus petition brought pursuant to 28 U.S.C. § 2254 is DENIED and DISMISSED.

IT IS SO ORDERED,

Dated: February 15, 2000
Syracuse, New York

S/ Frederick J. Scullin Jr.

Frederick J. Scullin, Jr.
United States District Judge

U.S. DISTRICT COURT - N.D. OF N.Y.
FILED
FEB 15 2000
AT _____ O'CLOCK _____
Lawrence K. Baerman, Clerk - Syracuse

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fifth day of November, two thousand two.

PRESENT:

HON. RALPH K. WINTER,
HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,

Circuit Judges.

THOMAS GONSA,

Petititoner-Appellant,

- v - No: 00-2167

JAMES STINSON, Superintendent,

Respondent-Appellee.

Appearing for Appellant: RANDI JUDA BIANCO,
Bianco Law Offices,
Syracuse, New York

Appearing for Appellee: ALICIA R. OUELLETTE,
Attorney General's Office
(Eliot Spitzer, Nancy A. Spiegel, of counsel),
Albany, New York.

Appeal from United States District Court Northern District of New York (Frederick J. Scullin, Jr., Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of February 15, 2000 be, and it hereby is, AFFIRMED.

Thomas Gonsa appeals from the district court's denial of his petition for habeas corpus under 28 U.S.C.§2254

The facts of this case were stated in the opinion below. Gonsa v. Stinson, No. 97-CV-1828 (N.D.N.Y. Feb. 15, 2000).

A jury convicted Gonsa of Robbery, Criminal Possession of Stolen Property, Second Degree Murder (Felony Murder) and Second Degree Murder (Depraved Indifference Murder). The court sentenced Gonsa to concurrent twenty-five years to life terms on the Murder convictions. Gonsa was also sentenced to seven years for Robbery to be served concurrently with two and one-third to seven years for Criminal Possession, but consecutively to the Murder sentences. Gonsa's total term is an indeterminate sentence of 33 and 1/3 years to life.

This sentence was improper. Under New York law, the Robbery sentence was required to be served concurrently with the Felony Murder sentence because the

robbery was an element of the Felony Murder charge. See N.Y. Penal Law § 70.25(2); New York v. Parks, 95 N.Y.2d 811, 813-15 (2000). The Robbery sentence should thus have been made concurrent to the Felony Murder sentence, but consecutive to the Depraved Indifference sentence. The result, however, would have been the same, a total sentence of 33 and 1/3 years to life. On appeal, the Appellate Division concluded, incorrectly, that the trial court had actually sentenced Gonsa to serve the Robbery sentence concurrently with the Felony Murder sentence. New York v. Gonsa, 220 A.D.2d 27, 32-33, 644 N.Y.S.2d 346. 349-50 (3d Dep't 1996), leave to appeal denied, 677 N.E. 2d 297 (N.Y. 1996).

Gonsa's habeas corpus petition contends, inter alia, that the trial court's imposition of the Robbery sentence consecutive to the Felony Murder sentence violated his double jeopardy rights. The district court concluded that the Appellate Division had "clarified" the sentence to make the Robbery sentence concurrent to the Felony Murder sentence and consecutive to the Depraved Indifference Murder sentence. Gonsa v. Stinson, slip op. at 7.

We review a district court's decision on a petition for habeas corpus de novo. Lurie v. Wittner, 228 F.3d 113, 121 (2d Cir. 2001). A petition under 28 U.S.C. § 2254 "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In this appeal, Gonsa does not seek any remedy for the erroneous imposition of a concurrent sentence on both

murder counts and the affirmance of that sentence by the Appellate Division based on its misreading of the certificate of conviction. Instead, while Gonsa concedes that the Robbery sentence could properly be made consecutive to the Depraved Indifference Murder sentence, he argues that under the circumstances here, the additional sentence for Robbery is impermissible because Robbery is an element of the Felony Murder charge, and he is therefore "already being punished for Robbery for his conviction for Felony-Murder." Appellant's Br. at 12. Petitioner thus asks this Court to order a reduction in his sentence to 25 years to life.

We agree with the district court's conclusion that there was no error in imposing an 8 1/3 to 25 year sentence for Robbery to run consecutive to the Depraved Indifference Murder charge because those two charges, unlike Robbery and Felony Murder, are based upon separate acts. See Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.") Accordingly, the sentence of 33 1/3 years to life was not improper. The Appellate Division's conclusion, therefore, that the imposition of the consecutive sentence here does not violate Double Jeopardy is not contrary to established Federal law, an unreasonable application of that law, or based on an unreasonable determination of the facts.

We have considered petitioner's remaining argument and find them without merit.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

S/ Lucille Carr
By:

11/25/02
Date

UNITED STATES COURT OF APPEALS
FILED
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Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eleventh day of February two thousand three.

Gonsa

Petititoner-Appellant,

v

Dkt No : 00-2167

Stinson

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Thomas Gonsa.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Roseann B. Mackechnie, Clerk

By: S/ Arthur Heller
Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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